OCT 12 2004

No. 04-245

In the Supreme Court of the United States

ROSALINDA ALT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

TERESA E. MCLAUGHLIN
REGINA S. MORIARTY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Tax Court's determination that petitioner should not be relieved of liability for tax deficiencies under the "innocent spouse" exception, 26 U.S.C. 6015.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001)	6-7
Brushaber v. *Union Pacific R.R.*, 240 U.S. 1 (1916)	8
Cash v. *Commissioner*, 580 F.2d 152 (5th Cir. 1978)	9
City of Pittsburgh v. *Alco Parking Corp.*, 417 U.S. 369 (1974)	8
Clark v. *Commissioner*, 76 T.C.M. (CCH) 219 (1998), aff'd, 187 F.3d 641 (8th Cir. 1999)	9
Druker v. *Commissioner*, 697 F.2d 46 (2d Cir. 1982), cert. denied, 461 U.S. 957 (1983)	7
Hayman v. *Commissioner*, 112 F.3d 1258 (2d Cir. 1997)	8
McGowan v. *Maryland*, 366 U.S. 420 (1961)	8
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	7
Quinn v. *Commissioner*, 524 F.2d 617 (7th Cir. 1975)	7
Regan v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983)	8
Reser v. *Commissioner*, 112 F.3d 1258 (5th Cir. 1997)	7-8
Steward Machine Co. v. *Davis*, 301 U.S. 548 (1937)	8

Cases—Continued: Page

United States v. *Alt*, 996 F.2d 827 (6th Cir. 1993) 3
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 7
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 7

Constitution and statutes:

U.S. Const. Amend. V 8
Internal Revenue Code (26 U.S.C.):
26 U.S.C. 1(a) 7
26 U.S.C. 1(d) 7, 8
26 U.S.C. 86 9
26 U.S.C. 214 9
26 U.S.C. 6013(d)(3) 7
26 U.S.C. 6015 ..... 2, 5, 6
26 U.S.C. 6015(b) 2, 4, 5, 6
26 U.S.C. 6015(b)(1)(C) 2
26 U.S.C. 6015(b)(1)(D) 2
26 U.S.C. 6015(c) 2, 3, 4, 8, 9
26 U.S.C. 6015(c)(3)(A)(i) 2
26 U.S.C. 6015(f) 2, 4, 6
26 U.S.C. 6015(f)(1) 3
Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685:
§ 3201, 112 Stat. 734 2
§ 3201(g)(1), 112 Stat. 740 2

In the Supreme Court of the United States

No. 04-245

ROSALINDA ALT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is not published in the *Federal Reporter* but is *reprinted in* 101 Fed. Appx. 34. The opinion of the Tax Court (Pet. App. 26-41) is reported at 119 T.C. 306.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2004. The petition for a writ of certiorari was filed on August 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Internal Revenue Code, an individual who files a tax return jointly with his or her spouse may be relieved of liability for understating a tax liability on

the return by demonstrating that he or she is an "innocent spouse." Specifically, Section 6015 of the Code provides three distinct types of relief for taxpayers who file joint federal income tax returns.*

a. Under Section 6015(b) of the Internal Revenue Code, an individual may avoid joint and several liability for a tax understatement by "establish[ing] that in signing the return he or she did not know, and had no reason to know, that there was such understatement," 26 U.S.C. 6015(b)(1)(C), and that, "taking into account all the facts and circumstances, it is inequitable to hold" the spouse liable for the deficient taxes. 26 U.S.C. 6015(b)(1)(D).

b. Section 6015(c)—the provision to which petitioner objects—provides that an individual who has filed a joint return may elect to limit his or her tax liability to the amount that would have been due had he or she filed separately. This relief is available only where the taxpayer is "no longer married to, or is legally separated from, the individual with whom such individual filed the joint return to which the election relates" or "was not a member of the same household" during the 12-month period prior to the election. 26 U.S.C. 6015(c)(3)(A)(i).

c. Finally, Section 6015(f) generally authorizes the Internal Revenue Service to grant "equitable" relief where a spouse does not qualify under Section 6015(b)

---

* In 1998, Congress substantially revised and expanded the "innocent spouse" exceptions to joint and several liability for jointly filed tax returns. See Internal Revenue Service Restructuring and Reform Act of 1998 (1998 Act), Pub. L. No. 105-206, § 3201, 112 Stat. 734. Although the liabilities at issue here arose prior to the enactment of the expanded exceptions, those provisions nonetheless apply to the liabilities that were unpaid on the date of their enactment. See § 3201(g)(1), 112 Stat. 740.

or (c), and "taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency." 26 U.S.C. 6015(f)(1).

2. Petitioner is a married woman who, in the tax years at issue here, filed joint federal tax returns with her husband, Dr. William J. Alt. Pet. App. 2, 30. During those tax years, petitioner's daughter, Karen, managed petitioner's and Dr. Alt's financial affairs and prepared their tax returns. *Id.* at 2. As part of this financial management, Karen created more than 40 corporations through which she funneled Dr. Alt's income, resulting in substantial tax deficiencies for the taxable years 1982 through 1989. *Ibid.* Several of the corporations were petitioner's nominees, and she made deposits to the various corporate bank accounts and used them to pay her and Dr. Alt's personal expenses. *Id.* at 14-15 & n.4.

The Commissioner of Internal Revenue subsequently issued notices of deficiency to petitioner and her husband for understated tax liabilities, and additions to tax for fraud and negligence. Pet. App. 3-4. Petitioner and her husband challenged the determination of tax liability in the United States Tax Court, and in 1993, entered a stipulated settlement determining deficiencies and additions to tax for 1982, 1983, 1984, 1986, 1987, and 1988. *Id.* at 4-5.

In addition to the proceedings before the Tax Court, criminal charges were brought against Dr. Alt and Karen for tax evasion and various other crimes. Pet. App. 3-4. They were convicted and imprisoned after a jury trial, but their convictions were reversed by the United States Court of Appeals for the Sixth Circuit due to improper jury instruction, see *United States* v. *Alt*, 996 F.2d 827 (1993), and the two eventually entered

pleas of guilty to lesser offenses. Pet. App. 4; Pet. 7. In 1992, the Commissioner commenced and prevailed in a civil action against the Alts to collect back taxes, penalties and interest. Pet. App. 5-6. The Alts' assets were seized to satisfy the judgment against them, but as of 2001, petitioner and her husband had accumulated tax deficiencies totaling $3,512,423. *Id.* at 6-7, 20.

In April 2000, petitioner filed a request for innocent spouse relief under Internal Revenue Code Section 6015(b), (c) and (f) for the taxable years 1982 through 1989. Pet. App. 7. The Commissioner denied that request. *Ibid.* On March 2, 2001, petitioner sought review of the Commissioner's determination in the United States Tax Court. *Ibid.*

3. The Tax Court denied petitioner's request for innocent spouse relief. Pet. App. 26-41. The court reasoned that petitioner was not eligible for relief under Section 6015(b) because, taking into account all the facts and circumstances, "it would not be inequitable to hold petitioner liable for the deficiencies." *Id.* at 39. Petitioner was not entitled to relief under Section 6015(c), because at the time of her petition, "petitioner and Dr. Alt were married, had not separated from one another, and had remained members of the same household during the 12-month period preceding the filing of the election by petitioner." *Ibid.* Finally, the court concluded that the Commissioner "did not abuse his discretion in denying petitioner relief under section 6015(f) for taxable years 1982 to 1988" in light of the court's analysis of the "equitable factors" under Section 6015(b). *Id.* at 41.

4. The court of appeals affirmed. Pet. App. 1-23. The court first observed that petitioner "raises *one* issue on appeal: whether the Tax Court erred in denying her innocent spouse relief under 26 U.S.C. § 6015."

Id. at 9 (emphasis added). She did not "specifically challenge the grounds on which the Tax Court denied her relief, namely that it was not inequitable to hold her liable," *ibid.*, but argued only that she was entitled to relief because she was "reared in a culture that demanded women refrain from questioning the breadwinner regarding fiscal matters." *Ibid.*

The court then examined petitioner's claim in light of each of the provisions providing for innocent spouse relief in Section 6015. Pet. App. 9-23. With respect to Section 6015(b), the court observed that it required a balancing of the following factors: "(1) the culpable spouse's wrongdoing directed toward the requesting spouse; (2) the requesting spouse's actual knowledge or reason to know of the tax deficiency; (3) the benefit the requesting spouse received from the tax deficiency in the past; (4) the requesting spouse and the culpable spouse's current marital status; and (5) the probable economic hardship that might be caused by the enforcement of joint and several liability." *Id.* at 11-12. Examining the record, the court concluded that no evidence suggested that "Dr. Alt either deceived Petitioner or concealed any information from her regarding their financial affairs or tax returns." *Id.* at 12-13. In addition, all other factors militated against granting relief: "a reasonable person in [p]etitioner's situation would have known of the tax deficiencies," *id.* at 16; "[p]etitioner enjoyed the 'fine life'" as a result of the savings from the deficiencies; petitioner had not been deserted or divorced by, or separated from Dr. Alt, *id.* at 19; and given that the couple's joint income exceeded $100,000, the family would "be able to pay reasonable basic living expenses if relief is not granted." *Id.* at 20-21.

With respect to the request for general equitable relief under Section 6015(f), the court held that the same analysis of whether liability was inequitable under Section 6015(b) applied. Pet. App. 21-22. Because petitioner had failed to demonstrate an inequitable result under Section 6015(b), "she is not eligible to be considered for the Secretary's discretionary relief under § 6015(f)(1)." *Id.* at 22.

Finally, the court of appeals noted that "[i]nitially petitioner brought a claim under § 6015(c)," but because she did "not challenge the Tax Court's factual finding regarding her marital status, which disqualifies Petitioner from relief pursuant to § 6015(c)(3)(A)(i), this Court need not address the issue." Pet. App. 22-23.

ARGUMENT

Petitioner contends (Pet. 13-20) that the innocent-spouse provisions of the Internal Revenue Code unconstitutionally burden the right to marry by treating individuals who terminate their marriages or live apart from their spouses more favorably than individuals who do not. Petitioner failed to raise that argument in the lower courts, however, and there is no conflict among the courts of appeals on that question. Moreover, petitioner's contention is without merit. Accordingly, further review is not warranted.

1. Petitioner failed to argue in the court of appeals that the innocent-spouse provisions unconstitutionally burden the right to marry. Rather, petitioner argued solely that she was entitled to relief under Section 6015 because she was "reared in a culture that demanded women refrain from questioning the breadwinner regarding fiscal matters." Pet. App. 9. Accordingly, whether Section 6015 is unconstitutional is not a question preserved for this Court's review. See *Adarand*

Constructors, Inc. v. *Mineta*, 534 U.S. 103, 109 (2001); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

2. In addition, there is no conflict over the question presented that would warrant this Court's review. Indeed, no court of appeals has even *considered* whether the innocent-spouse provisions unconstitutionally burden the right to marry by allegedly favoring divorced and separated individuals. Cf. *Quinn* v. *Commissioner*, 524 F.2d 617, 626-627 (7th Cir. 1975) (rejecting argument that innocent-spouse exemption was unconstitutional to the extent it failed to *always* insulate wives); see *Druker* v. *Commissioner*, 697 F.2d 46, 50-51 (2d Cir. 1982) (concluding marriage tax penalty does not unconstitutionally burden the right of marriage), cert. denied, 461 U.S. 957 (1983). As this Court has observed, "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). Judging an act's constitutionality would be particularly uncalled for where, as here, the courts of appeals have not considered its constitutionality and petitioner failed to raise the question in the lower courts.

3. In any event, petitioner's argument is without merit. Under the Internal Revenue Code, couples who file joint tax returns enjoy a lower tax rate on a given amount of income than couples filing separate returns, see 26 U.S.C. 1(a) and (d), but in exchange, are subject to joint and several liability for understatements on that return, see 26 U.S.C. 6013(d)(3), even where one spouse earns substantially more than the other. *Reser*

v. *Commissioner*, 112 F.3d 1258, 1262 (5th Cir. 1997); *Hayman* v. *Commissioner*, 992 F.2d 1256, 1259 (2d Cir. 1993). Married taxpayers may avoid joint liability by filing separate returns and paying tax at the rates applicable to married persons filing separate returns. 26 U.S.C. 1(d).

In light of that scheme, petitioner is wrong to claim (Pet. 14) that Section 6015(c) unconstitutionally interferes with the marriage right by "construct[ing] a barrier to 'innocent spouse' relief predicated on an ongoing marital relationship." In distinguishing between individuals who remain married to and living with their spouses and those who do not, Congress has created a valid and appropriate statutory classification.

Statutory classifications satisfy the requirements of due process "if they bear a rational relation to a legitimate governmental purpose." *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). When "creating classifications and distinctions in tax statutes," moreover, Congress enjoys "especially broad latitude." *Taxation With Representation*, 461 U.S. at 547; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584 (1937); *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 24, 26 (1916). A tax statute violates the Fifth Amendment only where "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property." *Brushaber*, 240 U.S. at 24; cf. *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 373 (1974).

The distinction in Section 6015(c) between individuals who remain married to and living with their spouses and those who do not is a legitimate statutory classification. It reflects the reality that it may be unfair to treat a couple as a single economic unit when they no

longer reside in the same household, pool economic resources, or obtain the financial benefits of marriage. Thus, the courts of appeals have upheld other statutory provisions according preferential treatment to spouses not sharing a household against due process challenges, including the dependent care expense deduction, 26 U.S.C. 214, which required married taxpayers in the same household to file a joint return in order to qualify for the deduction, see *Cash* v. *Commissioner*, 580 F.2d 152 (5th Cir. 1978), and formulas for computing the taxable portion of Social Security benefits, 26 U.S.C. 86, which set a "base amount" of zero for a married taxpayer filing separately who lived with his spouse for any part of the year, but of $25,000 for a married taxpayer filing separately who did not share a household with his spouse for any part of the year. *Clark* v. *Commissioner*, 76 T.C.M. (CCH) 219 (1998), aff'd, 187 F.3d 641 (8th Cir. 1999).

With respect to the innocent-spouse exception, it is entirely reasonable for Congress to offer increased protection to individuals who no longer function as a single economic unit. In those circumstances, the individual seeking innocent-spouse protection no longer benefits from any tax understatement or the tax benefits that come with marriage. Thus, it is more equitable to relieve such individuals of liability. By contrast, the Tax Court observed in this case that petitioner "continues to enjoy the lifestyle and financial security attributable to her husband's assets and income." Pet. App. 39. In such circumstances, the inequity that the innocent spouse exception seeks to alleviate is significantly lessened, if not absent altogether.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

TERESA E. MCLAUGHLIN
REGINA S. MORIARTY
Attorneys

OCTOBER 2004